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C O N F I D E N T I A L SECTION 01 OF 02 BEIJING 002462

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SUBJECT: OBSTACLES TO JUDICIAL REFORM IN CHIN

REF: BEIJING 2428

Classified By: Political Minister Counselor Aubrey Carlson. Reasons 1.
4 (b/d).

¶1. (C) Summary: Barriers to instituting genuine rule of law in China remain formidable, according to a variety of legal scholars and judicial officials. The National People's Congress's formal monopoly on interpreting the PRC constitution and the Party-controlled Supreme People's Court's de facto domination of judicial review hinder judicial independence. Corruption abounds, with close ties between local Party officials and judges and interference in court decisions by public opinion and the media. The Party still relies heavily on extra-judicial committees to shape the outcome of cases. The "petitioning system," used by citizens to seek redress for grievances, is a quasi-judicial apparatus that runs parallel to the court system and allows end runs around the formal judiciary. SPC review of capital offenses has resulted in a substantial drop in death penalties. End Summary.

Barriers to Judicial Independence

¶2. (C) The National People's Congress (NPC) has the power to supervise the courts and to interpret the constitution, according to Cai Dingjian (protect), Director of the Constitutionalism Research Institute at China University of Political Science and Law. In a meeting with PolOffs on August 18, Cai explained that in 1981, the NPC decided to delegate the interpretive power to each major Government division so that each is allowed to interpret the constitution on issues within its own sphere. For example, the Ministry of Foreign Affairs has the power to interpret the law in foreign affairs, the Supreme People's Procuratorate has the power to interpret prosecution issues (jiancha jieshi), and the Supreme People's Court (SPC) has the power of interpretation within the judiciary (sifa jieshi). The NPC retained the power to decide legislative intent (lifa jie shi). It is not clear how to distinguish between judicial interpretation and legislative intent, Cai noted.

¶3. (C) Despite its formal power, the NPC steps in to interpret the constitution only "very infrequently," and since Chinese law is often very general, tends to leave interpretation to the SPC, said Cai. In the now-famous Qi Yuling case, decided in 2001, the SPC instructed an appellate court to allow the constitution to be used as the basis for determining a citizen's rights, but this ruling was overturned in December 2008 by the current SPC President (see reftel). The SPC had even "more authority than the U.S. Supreme Court," Cai claimed, because it can make interpretations of the law outside of specific cases. (Note: In China, there is no "case or controversy requirement" for asserting jurisdiction.) As a result of this institutional pattern, Cai opined, China has no tripartite division of

government powers as in the U.S. with checks and balances that might allow for strict judicial independence. Ding Guangyu (protect), assistant to SPC Judge Hu Yunteng (protect), separately noted to PolOff earlier this s year that judicial interpretations were formal documents promulgated by the SPC, whereas judicial policies were informal and general. Nevertheless, Ding observed, the interpretations were followed by Chinese in trying cases and applying laws.

Corruption, Official Meddling, and Other Problems

¶4. (C) A prominent American legal scholar, in a meeting with EmbOffs in June, bemoaned the rampant corruption in China's judicial system, explaining that judges are subject to many outside influences as they try cases. For example, funding for provincial and local courts is generally provided at the local level, which increases the tie between local Party officials and the courts. Nanjing Normal University Law Professor Li Jianming (protect) told Embassy Resident Legal Advisor (RLA) in July that once a judge capitulated and changed a legal decision based on public opposition or interference by officials, he or she would be subjected to greater pressure the next time. Making a related point in a meeting with EmbOffs in May, prominent Beijing defense lawyers Mo Shaoping (protect) and Pu Zhiqiang (protect) underscored that the media are also a major source of interference confronting courts as they try cases.

¶5. (C) Three special committees, established by the Party in 1949 to assist judges in trying difficult or sensitive cases

BEIJING 00002462 002 OF 002

at a time when there were few trained jurists, are an additional source of interference in legal decisions according to Cai and Pu. (Note: The three committees are the CCP Central Committee's Political and Legal Affairs Committee, headed by Politburo Standing Committee member Zhou Yongkang; the Procuratorial Committee under the Supreme People's Procuratorate; and the Adjudication Committees in each court. All three committees have branches at each level of government and Party down to the county level. The authority of the Party's Political and Legal Affairs Committees is broad, including the courts, procuratorates, public security, state security, and police offices, and judicial bureaus. The authority of the other two committees is limited to their respective bureaucracies.) Cai said that judges today are better trained than they were sixty years ago, but that the Party still uses these committees to control court decisions, noting in particular interference from the Adjudication Committees within each court. However, he expressed optimism that the role of the committees had "changed with time," stating that with increased economic development in China, the trend is moving toward leaving judging to judges. Pu was less optimistic, describing the Political and Legal Affairs Committees as a "tool" by which the Party controls the judiciary.

Petitioning System: Counter to Rule of Law

¶6. (C) Contacts criticized China's petitioning system, which allows citizens to approach governments at various levels for redress of grievances outside the frame of the formal legal system. The petitioning system is the "mark of an imperfect legal system," explained Li Jianming. Tian Wenchang (protect), Director of Beijing King & Capital Law Firm, told RLA that the petition system is "counter to the rule of law," a remnant of the past that still exists as China makes the transition to a new legal system. As long as people can petition a review of a verdict they do not like, "the courts cannot become authoritative," Tian added. Cai Dingjian stated that the system is not only "ineffective and a waste of time and resources," but is "playing the people" (youxi baixing) by manipulating their hopes. However, Cai

acknowledged, the hope that people feel when petitioning does serve as an escape valve, as petitioners might resort to more violent means of expressing their frustration if this outlet were not available. In Cai's view, petitioning system functions should be incorporated into the judiciary in the long term, but the scope of the courts is now limited. They are currently unable to redress pollution problems or class action suits, among others, he noted. On August 4, Beijing University law professor He Weifang (protect) went further, telling RLA the petitioning system "should be abolished."

Death Penalty Reform

17. (C) SPC Judge Gao Jinhong, in a meeting with RLA and staff from the Congressional-Executive Commission on China, claimed that in the two years since the Party returned death penalty review power to the SPC, the SPC had imposed uniform standards and reduced the number of capital sentences.

(Note: The SPC originally had review authority over the death penalty but selectively delegated the authority to lower courts beginning in the early 1980s. In 2003, central authorities set up a special committee to review the issue, and it returned the review power to the SPC). Gao explained that capital defendants must be represented by a defense lawyer, if necessary on a pro-bono basis. When a defendant is sentenced to a suspended death penalty, reinstatement of the death sentence after conviction of a new intentional crime must be reviewed by the SPC, said Gao. These reviews are subject to strict control, and a "significant number" of these reinstatement requests are rejected, that is, they do not result in approval of execution, Gao claimed. Professor Li Jianming, a proponent of SPC review of death sentences, estimated that executions have been reduced by half. SPC Judge Du Weifu told RLA that the SPC's work has "increased enormously" due to death penalty review. Judge Du and his colleague SPC Judge Li Xiao both noted that their views on the death penalty have changed with time, citing personal examples of instances when they opposed death sentences. Beijing University law professor He Weifang criticized a recent case in which a man in Chengdu was sentenced to death for drunk-driving that resulted in five deaths. The decision was "flawed," He asserted, expressing doubt that the court consulted the SPC before imposing the sentence because the decision was contrary to the current direction of policy changes.

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